STATE OF MICHIGAN

COURT OF APPEALS

J & J FARMER LEASING , INC., FARMER BROTHERS TRUCKING, CO., INC., CALVIN ORANGE RICKARD, JR., and JAMES W. RILEY, as Personal Representative of the Estate of SHARYN ANN RILEY, Deceased,

Plaintiffs-Appellants,

v

CITIZENS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 22, 1999

No. 209236
Washtenaw Circuit Court
LC No. 96-3742-NO

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order granting defendant's motion for summary disposition in this breach of contract case alleging that defendant insurer refused to settle a wrongful death action in bad faith.[1] We reverse the grant of summary disposition and remand for further proceedings.

This case arose after the parties in the underlying wrongful death case, *James W. Riley, as Personal Representative of the Estate of Sharyn An Riley, Deceased, v J & J Farmer Leasing, Inc., Farmer Brothers Trucking Co. and Calvin Orange Rickard, Jr.*, Washtenaw Circuit Court Case No. 95-1816-NI, failed to settle and proceeded to trial. Defendant was the insurer of the defendants in the underlying case and provided a defense. The jury awarded in excess of $3,000,000 against J & J Farmer Leasing, Inc., Farmer Brothers Trucking Co., and Calvin Orange Rickard, Jr. (farmers). Defendant subsequently paid its policy limit of $750,000, leaving plaintiffs J & J Farmer Leasing, Inc., Farmer Brothers Trucking Co. and Calvin Orange Rickard, Jr., liable for the balance of the judgment. Plaintiff James W. Riley joined with the other plaintiffs, his judgment debtors, and filed the instant suit alleging bad-faith refusal to settle the wrongful-death case. The circuit court granted summary disposition, concluding that defendant could not be liable for bad faith because it offered to settle for the policy limit before trial. The court further concluded that defendant had no obligation to

pay pre-judgment interest, and therefore its failure to include pre-judgment interest in its offer to settle for the policy limit did not establish a bad faith refusal to settle.

As a preliminary matter, we reject defendant's jurisdictional challenge that this appeal was untimely. This Court has jurisdiction of an appeal as of right from a circuit court order if the appeal is filed within the time limits specified by MCR 7.204(A). MCR 7.203(A)(1); *Cipri v Bellingham Frozen Foods, Inc*, 213 Mich App 32, 39; 539 NW2d 526 (1995); *Adams v Perry Furniture Co (On Remand)* 198 Mich App 1, 5; 497 NW2d 514 (1993). A motion for reconsideration extends the time for filing a claim of appeal if the motion was filed within the initial twenty-one day period for the filing of a claim of appeal from the final order of judgment. MCR 7.204(A)(1)(b); *Adams, supra* at 6-7; *Gavulic v Boyer*, 195 Mich App 20, 23; 489 NW2d 124 (1992).

Plaintiffs filed their claim of appeal on January 29, 1998, well within the twenty-one day period following the January 20, 1998 entry of the circuit court order denying their motion for reconsideration. MCR 7.204(A)(1)(b). That plaintiffs filed their motion for reconsideration after the circuit court's in-court ruling on the motion for summary disposition but before the entry of the order granting summary disposition does not destroy jurisdiction in this case. Consistent with MCR 1.105, we construe the court rules to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties, and will not penalize appellant for filing a motion for reconsideration which, although premature, attempted to quickly correct a perceived error of the trial court, thereby possibly rendering an appeal unnecessary. Accordingly, because plaintiffs' motion for reconsideration was filed only three days before the entry of the order granting summary disposition, and the circuit court considered the motion on the merits, the motion is treated as having been filed within the requisite twenty-one day period. Such treatment does not violate MCR 7.204(A), which is intended in part to prevent a party from indefinitely extending the time for taking an appeal by filing a series of post-judgment motions. MCR 7.204, staff comment to 1989 amendment.

Plaintiffs first argue that the circuit court erred in concluding that the fact that defendant offered to settle for the policy limit before trial barred plaintiff's claim for bad-faith refusal to settle. We agree.

We review the circuit court's court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although defendant's motion was brought under MCR 2.116(C)(8) and (C)(10), our review is pursuant to MCR 2.116(C)(10) because the circuit court apparently looked beyond the pleadings. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence in the light most favorable to the non-moving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position with affidavits, depositions or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists, *id.*, and if it fails to present documentary evidence that establishes the existence of a material factual dispute,

the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), citing *McCormic v Auto Club Ins Assn*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

In *Commercial Union Ins Co v Liberty Mutual Ins Co*, 426 Mich 127, 134-136; 393 NW2d 161 (1986), the Court set forth a new definition of bad faith:

> Contrary to holdings in some other jurisdictions, bad faith should not be used interchangeably with either "negligence" or "fraud." Michigan has reached this conclusion in the past. Accordingly, we define "bad faith" for instructional use in trial courts as arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty. [*Id.* at 136.]

An insurer's good-faith denials, offers of compromise or other honest errors of judgment are not sufficient to establish bad faith. *Id.* at 137. Likewise, an insurer's negligence and bad judgment cannot establish a bad-faith claim, so long as the actions were made honestly and without concealment. *Id.* Because bad faith is a state of mind, an insurer can act in bad faith without actual dishonesty or fraud. *Id.* Thus, "if the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent." *Id.* The Court set forth twelve factors a factfinder may consider in determining whether liability exists for bad faith:

> 1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured,
>
> 2) failure to inform the insured of all settlement offers that do not fall within the policy limits,
>
> 3) failure to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances,
>
> 4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury,
>
> 5) rejection of a reasonable offer of settlement within the policy limits,
>
> 6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high,
>
> 7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits,
>
> 8) failure to make a proper investigation of the claim prior to refusing an offer of settlement within the policy limits,
>
> 9) disregarding the advice or recommendations of an adjuster or attorney,

10) serious and recurrent negligence by the insurer,

11) refusal to settle a case within the policy limits following an excessive verdict when the chances of reversal on appeal are slight or doubtful, and

12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal, especially where trial counsel so recommended. [*Commercial Union, supra*, 426 Mich 127, 137-139.]

The accident in which Sharyn Riley was killed occurred on November 15, 1994. Documentary evidence submitted below pertinent to defendant's handling of the wrongful death case established that Citizens reserved the case at the full policy limit, $750,000, in January 1995. On February 28, 1995, counsel retained by Citizens to represent the insureds (insureds' counsel) advised Citizen's senior claims adjuster that "based on the evidence we presently possess, I view this to be a case of adverse liability," and that she did "not believe given the circumstances of this case that a settlement range of $500,000 to $750,000 would be unreasonable." The insureds' counsel also noted that she was "quite concerned that the exposure in this case could easily exceed the insurance coverage available to the [insureds]." An internal memorandum dated March 14, 1995, from the claims manager of Citizens' Jackson office to the senior claims adjuster stated that counsel for the Riley estate spoke to the insureds' counsel "this week & said if we issued a draft for $750,000 ASAP he'd settle now." The memo further stated:

> Called Steve Regreuth [who apparently was in charge of all claims offices on liability claims] –advised that the *potential for over limits exposure is great* [Riley's estate's] atty suggested a fast settlement for limits. He gave $500,000 authority & if need more call –
>
> 49 yo female
>
> Tax preparer at H&R Block - $23,000/yr
>
> Started in real estate - from 4-94 - 11-94 listed 2 properties with total of both being $500,000
>
> surviving spouse; 1 son - 30; 1 daughter - 27 & 1 grandchild [Emphasis added.]

Another internal memo dated March 14, 1995, from Citizens' Jackson office branch manager to the senior claims adjuster stated that she had called counsel for the insureds and:

> gave her $500,000 authority – call if [the Riley estate's] atty comes back with a counter
>
> future wage – 368,000 368,000
>
> spouse -- 150,000 250,000
>
> 2 surviving children (grown)

	75,000	125,000
	75,000	125,000
grandchild	15,000	20,000
	683,000	888,000

future wage would be reduced to present value but w/inflation leaving as is

The senior claims adjuster's "case summary and authority request" dated March 17, 1995 stated under "analysis of liability," "90 - 100% liability on insured driver as he went over center line hitting cl [claimant] head-on," and 0-10% on clmt [claimant] as she may have been able to swerve & avoid the accident." An entry on an "adjusters report sheet" of Citizens' dated March 30, 1995 states "Atty [for Riley estate] sent letter w/demand of $750,000."

A letter from counsel for the Riley estate to the insureds' counsel, dated March 28, 1995, stated:

> In response to your inquiry I did confer with my client and I do have the authority to tell you that if in fact the insurance limits in this matter are $750,000.00 that there is no amount in damages within your policy limits that will resolve this claim. If either you or the corporate lawyer wish to tender the policy limits and negotiate the amount that the company would pay in excess of the insurance limits to resolve this claim I would be willing to discuss the matter further either with you, corporate counsel, or both depending upon the preferences of your clients.[2]

By letter dated April 5, 1995, counsel for the insureds requested of Citizens' senior claims adjuster that defendant tender the policy limit of $750,000 in the form of an offer of judgment in an effort to resolve the case:

> . . . although wrongful death cases often settle for considerably less than the amount of the policy limits in this case, and jury verdicts are often reasonable as well, a verdict well in excess of the policy limits available to my clients is also a very real possibility, particularly given the manner in which [the trial judge] will do everything he can to assist Mr. Logeman [plaintiff's counsel]. *Therefore, I hereby request that your company tender the policy limits of $750,000.00 to Mr. Logeman in an effort to resolve this case.* I would like to do this in the form of a formal offer to stipulate to entry of judgment for two reasons: (1) The Plaintiff is required by court rule to file a response to that offer within twenty-one days, although no response is presumed to be a rejection; and (2) with a bonafide offer of settlement on file we may be able to stop the running of pre-judgment interest in the event that this case were to go to trial and a verdict not as favorable was obtained by the Plaintiff.

> I would greatly appreciate it if I could have some response to this request within the next two weeks if possible. *I am sure that you appreciate the gravity of this situation,* and I know you will act with dispatch. [Emphasis added.]

An adjusters report sheet of Citizens' dated April 17, 1995 states "Farmer Bros. corp. atty requested letter stating why we won't pay our policy limits." A memo from Citizens' Jackson branch claims manager to the senior claims adjuster dated April 21, 1995 stated that although the Riley estate had rejected the $500,000 offer, its offer to settle for the policy limit of $750,000.00 was still on the table:

> ". . . . For the record I will document the facts as I related them to [defendant's Vice President of Claims]. . . . I told [him] that this is a Washtenaw County case. Our insd, Farmer Brothers Trucking and the driver of the vehicle, were clearly at fault in the accident. . . .
>
> * * *
>
> I passed on the fact to [him] that we had already extended the previously granted $500,000 settlement authority and that our offer had been flatly rejected by the pltfs who have indicated that they felt the case was worth something far in excess of our policy limits. *But that they were giving us an opportunity to save our insd from an excess verdict, for a limited time and would settle for our policy limits. I told [him] that we were getting a great deal of pressure from our insd and the agent to settle because of this concern for an excess verdict.* [He] indicated that he felt that none of this had an effect on his evaluation of this case. He thought that $500,000 was a more than fair evaluation particularly in light of the fact that there was little or no economic loss. [He] wanted to know how close we were to trial and I told him that we had not, as yet, even had mediation. [He] felt that it was appropriate to wait until mediation and once again reiterated the fact that he felt that $500,000 was a very fair evaluation of this case. [Emphasis added.]

On April 28, 1995, by letter from Citizens' senior claim adjuster to Mr. Farmer, Citizens rejected Farmer Brothers' request that the case be settled for the $750,000 policy limits. A May 3, 1995 memo from Citizens' Jackson branch claims manager to the senior adjuster also indicated that the Riley estate's demand for settlement for $750,000 remained on the table at that time: "[a]t this time, we have made an offer of $500,000 and claimant's attorney has requested our policy limits of $750,000." Another Citizens internal memorandum from the Jackson branch claims manager to the file, dated May 3, 1995, states that counsel for the insureds requested $750,000 but that Citizens "can wait for mediation" and is "prepared to stand on the $500,000." A letter from the insureds' counsel to Citizens' senior claims adjuster dated May 26, 1995 notes that "[s]ince there appears to be a substantial disagreement about the settlement value of this case" she commissioned a search regarding jury verdicts in Michigan involving wrongful death of a female between the ages of thirty five and sixty five, and that "there appears to be a substantial likelihood that a verdict could easily exceed those policy limits."

Counsel for the insureds notified Citizens' senior claims adjuster by letter dated June 22, 1995, that she filed an offer to stipulate to the entry of judgment in the amount of $500,000, had received the no-fault carrier's file, and that "the potential excess economic damages alone nearly exceed the [$500,000] offer of settlement that has been authorized in this case, without consideration of non-economic damages such as loss of society and companionship." By letter dated July 12, 1995, the insureds' counsel advised Citizens' senior claims adjuster that she had taken the decedent's husband's deposition, that he presented well, and that counsel for the Riley estate had recently made a counter-offer of judgment in the amount of 1.5 million dollars. She added, "[i]n light of this demand which is twice the policy limits available to my client, and a more definitive assessment of the potential economic damages in this case, I once again respectfully request that Citizens' senior claims adjuster consider tendering the policy limits to try and resolve this case." By letter dated November 30, 1995, private counsel for Farmer Brothers wrote to Citizens' senior claims adjuster that his analysis of the case was that Riley's estate "possess[es] a clear liability case with provable damages far in excess of the policy limits of $750,000.00," that he was "genuinely concerned about the probability of the jury returning a verdict in excess of policy limits," and that Citizens "owes a duty to my client to act in good faith . . . I seriously question Citizen's motives when it continually ignores counsel's request to offer policy limits to resolve the plaintiff's claim, when policy limits are clearly called for." The insureds' counsel in a letter to the senior claims adjuster dated November 21, 1995 again inquired whether Citizens had "reconsidered its position regarding a tender of policy limits" and that although she had "not received an indication from Plaintiff's counsel that a tender of policy limits will resolve the case, I do believe that such an offer would have to be considered very carefully on the Estate's part." By letters dated December 12 and 13, 1995, Citizens' senior claims adjuster responded to Farmer Brothers' private counsel and the insureds' counsel, stating that "we feel we have made a fair" evaluation and offer.

The case was mediated in late January 1996 in the amount of $950,000. Citizens' senior claim adjuster wrote to Farmer Brothers on February 5, 1996, advising that the case had mediated, that it was authorizing payment of the policy limit, and that "[i]f you wish to contribute any monies above [$750,000] up to the $950,000 mediation award, please advise so mediation can be accepted." Farmer Brothers' private counsel responded by letter dated February 6, 1996 that Citizens should offer the estate the policy limits and interest that has accrued, further noting that "a jury verdict in this case means that my client is out of business." Citizens' senior claims adjuster responded by letter dated February 9, 1996, stating: "I wish to advise you that Citizens Insurance has not now at or any time in the past received a demand from the Plaintiff [sic] attorney for the policy limits of $750,000 in this case."

Farmer Brothers' private counsel advised Citizens' senior claims adjuster to reject the mediation adding, "[t]he refusal of your company to make a reasonable offer of settlement is well documented," and "I see no evidence of any effort to protect my client from an excess judgment." The insureds' counsel rejected the mediation award. On or about February 21, 1996, the insureds' counsel filed an offer to stipulate to judgment in the amount of $750,000. The Riley estate requested a creditor's examination of Mr. Farmer, and the insureds' counsel wrote to Citizens on March 7, 1996 that if counsel for the Riley estate "is satisfied that it would be futile to continue this lawsuit . . . it is possible that the case could resolve for the amount of the offer of judgment." By letter dated March 18, 1996,

counsel for the Riley estate made an offer of judgment in the amount of $825,000 which was inclusive of interest and costs.

In early April 1996, counsel for the insureds filed a counter-offer to stipulate to entry of judgment in the amount of $750,000. An internal Citizens memorandum dated May 14, 1996, from Citizens' vice president of claims states that he attended a settlement conference the day before and, in an effort to break the dead-lock, proposed that Citizens would contribute an additional $25,000 toward settlement, that the insured do the same, and that the estate reduce its demand by $25,000. The case did not settle, and the memo indicates that the vice president instructed Citizens' counsel to leave the proposal on the table until the trial date of June 3, 1996. On June 6, 1996, the jury returned a verdict in excess of $3,000,000 in the estate's favor.

Viewing the facts and documentary evidence presented in a light most favorable to plaintiffs, a reasonable fact-finder could conclude that defendant rejected a reasonable settlement offer within the policy limit, unduly delayed in accepting a reasonable offer to settle within the policy limit when the verdict potential was high, and repeatedly disregarded the advice of counsel. *Commercial Union, supra* at 137-139. The circuit court considered only defendant's act of offering its policy limits after mediation in determining that defendant could not be liable for bad-faith refusal to settle, without addressing the twelve factors set forth in *Commercial Union*.

The circuit court's determination that plaintiffs' claim was automatically barred because defendant ultimately offered its policy limit before trial was improper. Plaintiff presented evidence establishing the existence of material factual disputes regarding the issue of bad faith. Summary disposition was improper.

Plaintiffs next argue that the circuit court erred when it failed to consider whether defendant's refusal to include pre-judgment interest in its offer of the policy limit could be evidence of bad-faith refusal to settle. The circuit court concluded that defendant had no contractual or statutory obligation to offer pre-judgment interest when it offered to settle for policy limits. We agree.

Defendant had no contractual duty to pay pre-settlement interest.[3] While an insurer has an obligation to act in good faith in settling its insured's claim, it has no statutory duty to pay in excess of its policy limit or pre-settlement interest on the amount paid in settlement of a tort claim, or in cases of consent judgments which do not include an agreement to pay prejudgment interest. *Quarters v Michigan Physicians Mutual Liability Co*, 154 Mich App 593, 597-599; 399 NW2d 46 (1986); MCL 600.6013; MSA 27A.6013. A plaintiff's right to statutory pre-judgment interest is waived in a case terminated by dismissal following a settlement because no final judgment was rendered. *Id.* at 597; *Freysing v Taylor Supply Co*, 197 Mich App 349, 351; 494 NW2d 870 (1992). "By accepting a settlement before judgment, a party trades off the loss of interest during the waiting period in exchange for the certainty of settlement." *Liimatta v Lukkari*, 185 Mich App 144, 147; 460 NW2d 251 (1990). The circuit court properly concluded that defendant had no contractual or statutory obligation to include pre-judgment interest in its offer to settle the case for policy limits before trial.[4]

We reverse the grant of summary disposition and remand for further proceedings. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

[1] Because plaintiffs do not argue on appeal that their negligence and intentional infliction of emotional distress claims were improperly dismissed, we deem those claims abandoned. *Meagher v Wayne State University*, 222 Mich App 700, 718; 565 NW2d 401 (1997).

[2] Later correspondence indicates that this was a negotiation posture and that the estate would have accepted the policy limit. See *infra*.

[3] The insurance policy in the present case provided in pertinent part:

> SECTION II - LIABILITY COVERAGE
>
> A. COVERAGE
>
> ***
>
> … We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.
>
> 2. COVERAGE EXTENSIONS
>
> ***
>
> (5) All costs taxed against the "insured" in any "suit" we defend.
>
> (6) All interest on the full amount of any judgment that accrues after the entry of the judgment in any "suit" we defend; but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

[4] It does not follow that any evidence or argument regarding defendant's conduct with regard to pre-judgment interest after mediation is automatically inadmissible or improper. The trial court must determine, within the context of the actual trial, the extent to which such evidence and argument will be permitted.